Veeravel Metal Sdn Bhd v Greentech Industries Sdn Bhd & Anor

HIGH COURT (PENANG) — CIVIL SUIT NO PA-22NCvC-207–12 OF 2018
AMARJEET SINGH JC
16 JULY 2019

Civil Procedure — Setting aside — Judgment in default of appearance — Plaintiff pleaded defendants failed to live up to obligations under agreements — Judgment in default of appearance entered against defendants — Defendants applied to set aside judgment in default of appearance and leave be given to file defence — Whether judgment in default irregular — Whether judgment in default ought to be set aside ex debito justitae — Whether defendants had right to file defence — Rules of Court 2012 O 13 r 6(1)

This was a notice of application to set aside the judgment in default of appearance entered against the defendants and that leave be given to file the defence within 14 days of this order. The plaintiff and the first defendant had entered into a sales and purchase agreement for a plot of land known as Plot No 5. On the same date, the plaintiff entered into a construction agreement with the second defendant to erect a factory building on Plot No 5. The plaintiff pleaded that the defendants had failed to live up to their obligations under the respective agreements. The judgment in default of appearance revealed that the reliefs as claimed in the statement of claim were granted by the court and hence this application.

Held:

(1) The mandatory orders sought by the plaintiff were in the nature of mandatory injunctions the granting of which was discretionary. The plaintiff had to proceed with the action and satisfied the court of its entitlement to the relief sought. Thus, the judgment in default of appearance obtained by the plaintiff by merely producing the certificate of non-appearance and proof of service of the writ and statement of claim was an irregular judgment. The plaintiff in such circumstances ought to have proceeded to prove its case as though the defendants had entered an appearance pursuant to O 13 r 6(1) of the Rules of Court 2012. The judgment in default entered by the plaintiff was an irregular judgment and was accordingly set aside ex debito justitae (see paras 16–18).

(2) The court was precluded from considering the merits of the defence. The power to extend time was a discretion that was to be exercised on valid reasons and not at the whim of the court. The defendants were under a

misapprehension in thinking that they had a right to file their defence as a matter of course. The prayer that the defendants be allowed to file their defence within 14 days of this decision was therefore disallowed (see paras 19–20).

[Bahasa Malaysia summary

Ini adalah notis permohonan untuk mengetepikan penghakiman tiada kehadiran yang dibuat terhadap defendan dan untuk kebenaran diberikan untuk memfailkan pembelaan dalam tempoh 14 hari daripada perintah ini. Plaintif dan defendan pertama telah menandatangani perjanjian jual beli untuk plot tanah yang dikenali sebagai Plot No 5. Pada tarikh yang sama, plaintif telah menandatangani perjanjian pembinaan dengan defendan kedua untuk mendirikan bangunan kilang di Plot No 5. Plaintif memplid bahawa defendan telah gagal mematuhi kewajipan mereka di bawah perjanjian masing-masing. Penghakiman tiada kehadiran menunjukkan bahawa relif seperti yang dikemukakan dalam pernyataan tuntutan telah diberikan oleh mahkamah dan dengan itu permohonan ini.

Diputuskan:

(1) Perintah mandatori yang dipohon oleh plaintif adalah dalam sifat injunksi mandatori yang mana adalah berdasarkan budi bicara. Plaintif terpaksa meneruskan tindakan itu dan berpuas hati dengan mahkamah dengan kelayakannya untuk mendapatkan relif. Oleh itu, penghakiman tiada kehadiran yang diperoleh oleh plaintif dengan hanya mengemukakan sijil ketidakhadiran dan bukti penyerahan writ dan penyataan tuntutan adalah penghakiman di luar aturan. Plaintif dalam keadaan sedemikian sepatutnya telah membuktikan kesnya seolah-olah defendan telah memasuki kehadiran menurut A 13 k 6(1) Kaedah-Kaedah Mahkamah 2012. Penghakiman ingkar yang dimasukkan oleh plaintif adalah penghakiman di luar aturan dan sewajarnya diketepikan ex debito justitae (lihat perenggan 16–18).

(2) Mahkamah telah dihalang daripada mempertimbangkan merit pembelaan. Kuasa untuk melanjutkan masa adalah budi bicara yang akan dilaksanakan atas sebab-sebab yang sah dan bukan pada kehendak mahkamah. Defendan telah salah anggap dalam pemikiran bahawa mereka mempunyai hak untuk memfailkan pembelaan mereka. Permohonan bahawa defendan dibenarkan memfailkan pembelaan mereka dalam masa 14 hari daripada keputusan ini adalah oleh itu ditolak (lihat perenggan 19–20).]

Cases referred to

Mokhtar bin Amin v Omar bin Mat Ziki @ Mohd Ziki [1998] MLJU 280; [1999] 1 CLJ 119, HC (refd)

Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors [1990] 3 MLJ 254, HC (refd)
Syarikat Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129, SC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)
Witech Sdn Bhd & Ors v BHR Group Ltd [2011] 1 MLJ 781; [2010] 9 CLJ 288, CA (refd)
Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112; [2008] 4 CLJ 175, CA (refd)

Legislation referred to

Rules of Court 2012 O 13, O 13 rr 1, 2, 3, 4, 5, 6, 6(1)

Chee Chin Yen (Dharan & Co) for the plaintiff.
Chang Mooi Yim (Fadzil Chua & Song) for the defendant.

Amarjeet Singh JC:

THE APPLICATION

[1] This is a notice of application dated 21 February 2019 to set aside the judgment in default of appearance entered on 22 January 2019 against the defendants and that leave be given to file the defence within 14 days of this order ('encl 10').

[2] The chronology of events leading to the filing of encl 10 are as follows:

19 December 2018	Service of writ of summons and statement of claim.
3 January 2019	Filing of the certificate of non-appearance and affidavit of service.
8 January 2019	Filing of the memorandum of appearance by both defendants.
22 January 2019	Judgment in default of appearance entered against the defendants.
21 February 2019	Notice of application filed to set aside the judgment in default of appearance.
11 March 2019	Sealed copy of the judgment in default of appearance served on the defendants.

[3] The chronology of events shows that the memorandum of appearance was filed and served five days out of time and that the defendants have to date not filed their defence.

A THE CLAIM

[4] The statement of claim reveals that the plaintiff and the first defendant had entered into a sales and purchase agreement dated 13 December 2010 for a plot of land known as Plot No 5, Lot 6147, Seksyen 3, Bandar Butterworth, B Daerah Seberang Perai. The first defendant was to obtain a separate document of title for Plot No 5 and thereupon to execute a valid transfer in favour of the plaintiff. The first defendant was also required to deliver vacant possession within 24 months from the date of the sales and purchase agreement and in default would be penalised with liquidated damages.

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[5] On the same date, the plaintiff entered into a construction agreement with the second defendant to erect a factory building on plot No 5. The construction was to commence upon the delivery of vacant possession of the plot No 5 to the plaintiff or any earlier date pursuant to the consent of the first D defendant. The second defendant was also requires to deliver vacant possession of the building within the specified time and in default would be penalised with liquidated damages.

[6] The plaintiff pleaded that the defendants had failed to live up to their E obligations under the respective agreements.

[7] The reliefs claimed by the plaintiff against the first defendant are as follows:

F (a) the first defendant is ordered to produce a separate document of title in the name of the plaintiff within 14 days of this judgment;

(b) liquidated damages for late delivery amounting to RM932,086.80 as at 11 December 2018;

G (c) the first defendant is to settle the back dated assessment and land tax up till the issuance of the document of title;

(d) damages or losses in the form of rental amounting to RM960,000 from January 2013–2017 at RM20,000 a month;

H (e) damages for loss of business profits to be assessed by the court; and

(f) exemplary damages and aggravated damages.

[8] The reliefs claimed by the plaintiff against the second defendant are:

I (a) the second defendant is ordered to apply for the certificate of fitness for occupation within 14 days of this judgment;

(b) liquidated damages for late delivery amounting to RM 932,086.80 as at 11 December 2018;

(c) damages or losses in the form of rental amounting to RM960,000 from January 2013–2017 at RM20,000 a month;

(d) damages for repairing the factory building;

(e) damages for loss of business profits to be assessed by the court; and

(f) exemplary damages and aggravated damages.

[9] The judgment in default of appearance reveals that the reliefs as claimed in the statement of claim were granted by the court.

[10] To set aside this judgment the defendants advanced two grounds:

(a) that the judgment is an irregular judgment and is therefore liable to be set aside ex debito justitiae; and

(b) that the defendants have a defence on the merits.

THE LAW ON JUDGMENT IN DEFAULT OF APPEARANCE

[11] The approach of the court when considering an application to set aside a judgment in default is as follows:

(a) first, the court has to ascertain whether the judgment in default is a regular or irregular judgment. If, the judgment is an irregular judgment, then the judgment in default is set aside ex debitio justitae; and

(b) second, if the judgment is a regularly judgment, then the court determines whether there is a defence on merits. At this stage. The delay in making the application to set aside is a factor to be considered by the court in deciding whether to grant or refuse the application.

(See *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112; [2008] 4 CLJ 175; and *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241).

[12] The first ground concerns the right of the plaintiff to enter judgments in default of appearance to a writ. The provision that governs this area is O 13 of the Rules of Court 2012. This order empowers the court to grant judgments in default of appearance in six different forms depending on the type of claim sought by the plaintiff.

[13] It is established law that a judgment in default which is wrongly entered under O 13 of the Rules of Court 2012 is a substantive defect and not a

procedural defect which could be cured. The entry of such judgment will entitle the defendant ex debito justitiae to set it aside (see *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254; *Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129; *Mokhtar bin Amin v Omar bin Mat Ziki @ Mohd Ziki* [1998] MLJU 280; [1999] 1 CLJ 119 at p 130).

[14] Thus, it is crucial for a plaintiff to ensure that the judgment in default is entered under the correct rule. O 13 of the Rules of Court 2012 provides for the following claims:

(1) a claim for a liquidated demand only (r 1);

(2) a claim for unliquidated damages only (r 2);

(3) a claim in detinue only (r 3);

(4) a claim for possession of immovable property only (r 4);

(5) two or more of the claims as stated in rr 1–4 and no other claim (r 5); and

(6) a claim of a description not mentioned in rr 1–4 (r 6).

[15] The plaintiff appears to be seeking mandatory orders, liquidated damages and unliquidated damages which could only fall within the scope of r 6(1) of O 13 of the Rules of Court 2012 which reads as follows:

> Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered on appearance.

[16] It is to be observed that under O 13 r 6(1) of the Rules of Court 2012 a plaintiff has to proceed with the action as if the defendant had entered an appearance. The mandatory orders sought by the plaintiff are in the nature of mandatory injunctions the granting of which is discretionary. In such cases the plaintiff has to proceed with the action and satisfy the court of its entitlement to the relief sought.

[17] Thus, the judgment in default of appearance obtained by the plaintiff in the instant case, by merely producing the certificate of non-appearance and proof of service of the writ and statement of claim is an irregular judgment. The plaintiff in such circumstances ought to have proceeded to prove its case as though the defendants had entered an appearance pursuant to r 6(1) of O 13 of the Rules of Court 2012.

[18] The judgment in default entered by the plaintiff in the present is an

irregular judgment and is accordingly set aside ex debito justitae.

[19] The defendants have also raised the question of having a defence on merits. In view of the decision to set aside the judgment in default of appearance, this court is precluded from considering the merits of the defence (see *Witech Sdn Bhd & Ors v BHR Group Ltd* [2011] 1 MLJ 781; [2010] 9 CLJ 288).

[20] The defendants' second relief in encl 10 is now addressed. The defendants seek an order to file a defence within 14 days of this decision. In my view, it is not a matter of course that this court grants the prayer sought. The defendants' have not sought an order for leave to file and serve not only their appearance out of time but their defence, which has yet to be filed, out of time. The power to extend time is a discretion that is to be exercised on valid reasons and not at the whim of the court. The defendants are therefore under a misapprehension in thinking that they have a right to file their defence as a matter of course. The prayer that the defendants be allowed to file their defence within 14 days of this decision is therefore disallowed.

[21] Parties are to bear their own costs.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali